Wong Pang Siong v Wu Toh Wen @ Goh Dong Nang

HIGH COURT (MUAR) — CIVIL APPEAL NO 12–2 OF 2006
AHMADI ASNAWI JC
4 APRIL 2008

Civil Procedure — Appeal — Memorandum of appeal — 14 days period to file — Application for an extension of time — Delay of 8 months and 29 days — Refusal to comply with sessions court's order — Whether failure to file memorandum of appeal as prescribed by law — Rules of the High Court 1980 O 55 r 2(1)

This was the appellant/defendant's application by way of summons in chambers for an order that the appellant be allowed an extension of time to file his memorandum of appeal. On 14 April 2006, the respondent/plaintiff obtained a judgment against the appellant for a sum of RM160,000 with cost after a full hearing. Dissatisfied with the said judgment, on 19 April 2006 the appellant filed a notice of appeal. Pursuant to the said judgment, the respondent initiated a bankruptcy proceedings against the appellant on 30 November 2006 to execute the judgment on account of the appellant's failure to pay the judgment sum. On 12 February 2007, the appellant's solicitors wrote a letter to the Batu Pahat Sessions Court registrar applying for the relevant notes of proceedings and the grounds of judgment. Two days later, ie on 14 February 2007, the appellant's solicitors received Form 141 from the registrar of the Batu Pahat Sessions Court dated 28 June 2006, informing the appellant that the said documents were ready and available. The appellant contended that he did not receive the said Form 141 notice on or about the 28 June 2006 but only on the 14 February 2007 upon which thereafter the requisite deposit amounting to RM250 was duly paid into court on 27 February 2007. The appellant further contended that in view of the same, the 14 days period in which to file the memorandum of appeal should run from the 14 February 2007, leaving him the latest until 6 March 2007 to file the same. Accordingly that would leave a delay of 17 days up to the time of filing this application for an extension of time to file the memorandum of appeal. The respondent submitted that his solicitor's office received the same notice on the 30 June 2006. The said notice was forwarded to the appellant's address as was provided by the appellant. Additionally in the course of the hearing of this application on 19 July 2007, learned counsel for the appellant informed the court that the appellant did indeed received the

said notice in June 2006. This meant a delay of 8 months and 29 days up to the date of filing of this application. A

Held, dismissing the application with costs: B

(1) It is trite that the memorandum of appeal operates as a notice, so as to provide the other party the relevant points that will be further ventilated at the appeal stage. Thus, it was incumbent upon the appellant to take prompt action in filing the memorandum of appeal so that the opponent would have the opportunity to study the grounds and reasons that would be raised at the appellate stage (see para 9). C

(2) From the court's records, the fact showed that the Batu Pahat Sessions Court registrar had issued Form 141 on 28 June 2006. The records further demonstrated that unequivocally that all relevant parties had been notified on the aforesaid date. There was no reason for the court not to issue Form 141 to the appellant since all parties had been notified. Thus, it could not be true that the appellant received the notice in Form 141 only on 14 February 2007. Further, it also showed that the said notice which was also extended to this court, was received by the court's registry on the 30 June 2006. There was no reason for the Batu Pahat Sessions Court registrar not to issue the said notice on the same date as those issued to this court and the respondent's solicitors. Therefore the court found that the appellant did indeed receive the said notice on 30 June 2006. By all accounts there was a delay and the appellant failed to file his memorandum of appeal as prescribed by law (see paras 2, 5 & 11). D E F

(3) The appellant's solicitors' excuse that the delay in filing the memorandum was because he was awaiting further instructions from the appellant and the relevant documents in view that the appellant was previously represented by a different solicitor in the proceedings before the Batu Pahat Sessions Court was indeed a lame excuse. Since he was appointed as the appellant's new solicitors (*Notis Perlantikan Peguamcara* dated 11 May 2006), after the notice of appeal was lodged, it was only reasonable to assume that all the necessary instructions must have already been given to extend to all matters incidental to the appeal such as preparing and filing the memorandum of appeal and other related matters thereafter, matters which were technical in essence which could be done without the presence of the appellant. Equally less convincing was his excuse that he was unable to contact the appellant and vice-versa (see para 13). G H I

(4) It is pertinent to note that the amendment to O 55 r 2(1) is to prevent undue delay by any party dissatisfied with the court's decision to pursue

his appeal and to provide a certain time table for the conduct of the litigation. To entertain the kind of excuses put forth by the appellant was to make a mockery of the amendment. The appellant sprung into action only after the respondent initiated the bankruptcy proceedings at the High Court with the intention of bankrupting the appellant upon the appellant's refusal to comply with the orders made by the Batu Pahat Sessions Court (see para 16).

[Bahasa Malaysia summary

Ini adalah permohonan perayu/defendan melalui saman dalam kamar untuk satu perintah bahawa perayu dibenarkan melanjutkan masa untuk memfailkan memorandum rayuannya. Pada 14 April 2006, responden/plaintif memperolehi satu penghakiman terhadap perayu untuk jumlah RM160,000 dengan kos. Tidak puas dengan penghakiman tersebut, pada 19 April 2006 perayu memfailkan satu notis rayuan. Berikutan penghakiman tersebut, responden memulakan satu prosiding kebankrapan terhadap perayu pada 30 November 2006 untuk menyempurnakan penghakiman selepas perayu gagal membayar jumlah penghakiman tersebut. Pada 12 Februari 2007, peguamcara perayu menulis satu surat kepada pendaftar Mahkamah Sesyen Batu Pahat memohon nota-nota relevan prosiding tersebut dan alasan-alasan penghakiman. Dua hari kemudiannya, iaitu pada 14 Februari 2007, peguamcara perayu menerima Borang 141 daripada pendaftar Mahkamah Sesyen Batu Pahat bertarikh 28 Jun 2006, memaklumkan kepada perayu bahawa dokumen-dokumen telah sedia ada. Perayu menegaskan bahawa ia tidak menerima notis Borang 141 pada atau sekitar 28 Jun 2006 tetapi hanya pada 14 Februari 2007 di mana selepas itu deposit yang perlu dibayar berjumlah RM250 telah dibayar ke mahkamah pada 27 Februari 2007. Perayu selanjutnya menegaskan bahawa memandangkan perkara tersebut, jangkamasa 14 hari untuk memfailkan memorandum rayuan sepatutnya bermula daripada 14 Februari 2007, meninggalkannya paling lambat sehingga 6 Mac 2007 untuk memfailkannya. Dengan itu terdapat kelewatan 17 hari sehingga masa ia memfailkan untuk satu lanjutan masa untuk memfailkan memorandum rayuan. Responden berhujah bahawa pejabat guamannya menerima notis yang sama pada 30 Jun 2006. Notis tersebut ditujukan ke alamat perayu seperti yang diberikan oleh perayu. Tambahan pula semasa perbicaraan permohonan ini pada 19 Julai 2007, peguamcara perayu memberitahu mahkamah bahawa perayu sebenarnya telah terima notis tersebut pada Jun 2006. Ini bermaksud satu kelewatan 8 bulan dan 29 hari sehingga tarikh pemfailan permohonan ini.

Diputuskan, menolak permohonan dengan kos:

(1) Adalah nyata bahawa memorandum rayuan bertindak sebagai notis,

untuk memperuntukkan pihak yang satu lagi poin yang relevan yang akan selanjutnya diventilate pada peringkat rayuan. Oleh itu, adalah wajib ke atas perayu untuk mengambil tindakan yang cepat di dalam memfailkan memorandum rayuan dengan itu pihak menentang akan mempunyai peluang untuk mengkaji alasan-alasan yang akan dibangkitkan pada peringkat rayuan (lihat perenggan 9).

(2) Daripada rekod mahkamah, fakta menunjukkan bahawa pendaftar Mahkamah Sesyen Batu Pahat telah mengeluarkan Borang 141 pada 28 Jun 2006. Rekod selanjutnya menunjukkan bahawa jelas kesemua pihak relevan telah diberitahu pada tarikh tersebut. Tidak ada alasan untuk mahkamah tidak mengeluarkan Borang 141 kepada perayu memandangkan kesemua pihak telah diberitahu. Oleh itu, adalah tidak benar perayu menerima notis Borang 141 tersebut hanya pada 14 Februari. Selanjutnya, ia juga menunjukkan bahawa notis tersebut yang juga diberikan kepada mahkamah ini, telah diterima oleh pendaftar mahkamah pada 30 Jun 2006. Tiada alasan mengapa pendaftar Mahkamah Sesyen Batu Pahat tidak mengeluarkan notis tersebut pada tarikh yang sama seperti yang dikeluarkan kepada mahkamah ini dan kepada peguamcara responden. Dengan itu, mahkamah mendapati perayu sebenarnya telah menerima notis tersebut pada 30 Jun 2006. Mengambil kira kesemuanya, terdapat kelewatan dan perayu gagal untuk memfailkan memorandum rayuan seperti yang diperuntukkan oleh undang-undang (lihat perenggan-perenggan 2, 5 & 11).

(3) Alasan peguamcara perayu bahawa kelewatan memfailkan memorandum rayuan tersebut adalah kerana beliau sedang menunggu arahan selanjutnya daripada perayu dan dokumen-dokumen yang relevan memandangkan perayu diwakili sebelum itu oleh peguamcara yang lain di dalam prosiding di Mahkamah Sesyen Batu Pahat adalah lemah. Oleh kerana beliau dilantik sebagai peguamcara baru perayu (Notis Perlantikan Peguamcara bertarikh 11 Mei 2006), selepas notis rayuan difailkan, ia adalah munasabah untuk menganggap bahawa kesemua arahan-arahan yang perlu semestinya telah diberi yang meliputi kepada semua perkara yang berkaitan dengan rayuan seperti persediaan dan pemfailan memorandum rayuan dan perkara-perkara lain yang berkaitan seterusnya, perkara-perkara yang bersifat teknikal yang dapat dilakukan tanpa kehadiran perayu. Juga yang tidak menyakinkan adalah alasannya bahawa beliau tidak dapat menghubungi perayu dan sebaliknya (lihat perenggan 13).

(4) Ia adalah penting untuk diambil perhatian bahawa pindaan kepada A 55 k 2(1) adalah untuk menghalang kelewatan yang tidak wajar oleh mana-mana pihak yang tidak berpuas hati dengan keputusan mahkamah untuk melanjutkan rayuannya dan memberikan satu jadual

bagi tindakan litigasi. Melayan alasan sebegini yang diberikan oleh perayu adalah mempersendakan pindaan tersebut. Perayu hanya bertindak selepas responden memulakan prosiding kebankrapan di Mahkamah Tinggi dengan niat membankrapkan perayu apabila perayu enggan mengikut perintah-perintah yang dibuat oleh Mahkamah Sesyen Batu Pahat (lihat perenggan 16).]

Notes

For cases on memorandum of appeal, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1190–1205.

Cases referred to

Ahmad bin Yahaya & Anor v Ahmad bin Sulaiman [1972] 2 MLJ 109 (refd)
Batang Kali Estates Sdn Bhd v Romani bte Abdul Aziz & Anor [1993] 2 MLJ 267 (refd)
Cosway (M) Sdn Bhd & Anor v Gan Poh Im [2006] 1 MLJ 568 (refd)
Elayachee v Woo Siu Tip [1991] 3 MLJ 108 (refd)
Hj Abdul Ghani Kesah v Tuan Ahmad Tuan Man [1990] 3 MLJ 45 (refd)
Sarawak Electricity Supply Corporation & Ors v Kwan Choon Kiong [2003] 4 CLJ 381 (refd)
Worldwide Laser Service Corp v Excel Electronics & Industrial Suppliers Sdn Bhd [1998] 1 CLJ 203 (refd)

Legislation referred to

Rules of the High Court 1980 O 1A, O 2 r 3, O 55 r 2, Form 141

N Chandra Mohan (N Chandra Mohan & Partners) for the plaintiff.
Nur Adurawati (Gordon-Lew & Co) for the defendant.

Ahmadi Asnawi JC:

[1] This is the appellant/defendant's application by way of summons in chambers for an order that the appellant be allowed an extension of time to file his memorandum of appeal.

[2] The facts leading to this application are as follows. On 14 April 2006, the respondent/plaintiff obtained a judgment against the appellant for a sum of RM160,000 with cost after a full hearing vide Tindakan Saman No 52–617 of 2001. Dissatisfied with the said judgment, on 19 April 2006 the appellant filed a notice of appeal. Pursuant to the said judgment, the respondent initiated a bankruptcy proceedings against the appellant on 30 November 2006 to execute the judgment on account of the appellant's failure to pay the judgment sum. On 12 February 2007, the appellant's solicitors wrote a letter to the Batu Pahat Sessions Court registrar applying for

the relevant notes of proceedings and the grounds of judgment. Two days later, ie on 14 February 2007, the appellant's solicitors received Form 141 from the registrar of the Batu Pahat Sessions Court dated 28 June 2006 (exh NLH-6, encl 9), informing the appellant that the said documents were ready and available.

[3] It is the appellant's contention that he did not receive the said Form 141 notice on or about the 28 June 2006 but only on the 14 February 2007 upon which thereafter the requisite deposit amounting to RM250 was duly paid into court on 27 February 2007. The appellant further contended that in view of the same, the 14 days period in which to file the memorandum of appeal should run from the 14 February 2007, leaving him the latest until 6 March 2007 to file the same. Accordingly that would leave a delay of 17 days up to the time of filing this application for an extension of time to file the memorandum of appeal (encl 9).

[4] However it is the respondent's submission that the appellant's averments lacks credibility. His (respondent) solicititor's office received the same notice on the 30 June 2006. The said notice was forwarded to the appellant's address as was provided by the appellant. Additionally in the course of the hearing of this application on 19 July 2007, learned counsel for the appellant informed the court that the appellant did indeed received the said notice in June 2006. It cannot be earlier than 28 June 2006, for that was the date the notice was issued by the court. Thus it is only safe to conclude that the notice in Form 141 was received by the appellant on 30 June 2006. This leaves a delay of 8 months and 29 days up to the date of filing of this application.

[5] In this respect I am inclined to be with the respondent's submission. Even this court's records shows that the said notice which was also extended to this court, was received by the court's registry on the 30 June 2006. There is no reason for the Batu Pahat Sessions Court Registrar not to issue the said notice on the same date as those issued to this court and the respondent's solicitors. Therefore it is my findings that the appellant did indeed received the said notice on 30 June 2006. Be that as it may, by all accounts there was a delay and the appellant failed to file his memorandum of appeal as prescribed by law.

[6] The issue now is whether it is appropriate, in the circumstances of the case, to allow the applicant's application to extend the 14 days period for filing the memorandum of appeal. Learned counsel for the appellant concedes that there has been a delay on the part of the appellant but it occurred without any intention to disregard the provision of the law. For the purpose of this application, O 55 r 2 of the RHC provides the time frame within which the appellant has to file his memorandum of appeal:

A (1) The appellant shall, within fourteen days from the date of service on him of the notice in Form 141 under Order 49, rule 2 sub-rule (4) or rule 3 sub-rule (2) of the Subordinate Courts Rules 1980 (as the case may be), file in the High Court in duplicate a memorandum of appeal in Form 113A.

B (2) The appellant shall within the like period serve each respondent with a copy such memorandum and a copy of the appeal record.

C **[7]** In *Cosway (M) Sdn Bhd & Anor v Gan Poh Im* [2006] 1 MLJ 568, the Court of Appeal after considering the views expressed by Eusoff Chin J in the case of *Elayachee v Woo Siu Tip* [1991] 3 MLJ 108 and Lamin J in the case of *Hj Abdul Ghani Kesah v Tuan Ahmad Tuan Man* [1990] 3 MLJ 45, held that the memorandum of appeal must be filed within 14 days from the receipt of Form 141. Therefore the prescribed time for filing of the D memorandum of appeal is 14 days from the date of service of Form 141, as conferred by O 55 r 2(1) of the Rules of the High Court 1980. The court next discussed the issue whether the court has the discretion to extend the time for the filing of memorandum of appeal. In the event it was decided that even though the new O 55 r 2 (1) has removed the words 'or within such E extended time as the court may allow', nevertheless the court still retained the discretionary power to extend the said time. The amendment to the said Order would not deprived the court to exercise its discretion to extend the prescribed 14 days period if the court considers it is necessary in the circumstances of the case to do so.

F **[8]** Now, how should this discretion be exercised by the court as allowed by law. In *Batang Kali Estates Sdn Bhd v Romani bte Abdul Aziz & Anor* [1993] 2 MLJ 267, the court stated that the countdown for the 14 days period begins to run from the date of the service on the appellant of the Form 141 G and allowed the delay beyond the 14 days period on account that a reasonable explanation was provided to explain the delay. Consequent thereto for the purposes of extending the 14 days period for filing the memorandum of appeal, the court should exercise the discretion only if there is a legitimate H basis to do so. There must be a consideration of all the circumstances pertinent to the case. Each case is distinctive, hence warranting a wide leeway for the exercise of the discretion. In short the applicant who applied for the extension of time beyond the 14 days period, must account and provide convincing reasons for the delay in filing the memorandum of appeal.

I **[9]** It is trite that the memorandum of appeal operates as a notice, so as to provide the other party the relevant points that will be further ventilated at the appeal stage. It was stated in *Worldwide Laser Service Corp v Excel Electronics & Industrial Suppliers Sdn Bhd* [1998] 1 CLJ 203:

Of course there are several good reasons for the requirement of a memorandum of appeal. It serves to point out errors for future guidance of the subordinate court, where the latter has erred. It gives notice to the respondents the grounds of appeal so that the respondent comes prepared to deal with the arguments raised. It serves to focus submissions to the mistakes. Without the limitation of the memorandum of appeal, the floodgates would be opened for appeals that actually seek a rehearing and hoping to strike lucky on a rehearing. In the extreme it could become an avenue of transfer of hearings of applications from the subordinate court to the High Court, of all things on decisions not even after a trial.

[10] It is thus incumbent upon the appellant to take prompt action in filing the memorandum of appeal so that the opponent will have the opportunity to study the grounds and reasons that will be raised at the appellate stage.

[11] In this application, the applicant alleged that he has not received Form 141 until on 14 February 2007. Nevertheless, from the court's record, the fact shows that the Batu Pahat Sessions Court registrar has issued Form 141 on 28 June 2006, as shown at encl 6. The records relating to the issuance of Form 141 by the sessions court, further demonstrates unequivocally that all relevant parties have been notified on the aforementioned date. There is no reason for the court not to issue Form 141 to the appellant since all parties have been notified. For the reasons given earlier in the preceding paragraphs it cannot be true that the appellant received the notice in Form 141 only on 14 February 2007 and as reiterated earlier the 14 days period to file the memorandum of appeal does not run from this date.

[12] I have examined all the cases submitted by the appellant where the court in the exercise of its discretion had extended the time to file one's memorandum of appeal beyond the 14 days period as prescribed by O 55 r 2 of the RHC. It is apparent that all the cases submitted by the appellant are not on all fours with the case before me on account that the appellant here has failed to provide the court with a reasonable explanation regarding the delay. In addition, the affairs causing the delay in all the cases forwarded by the appellant are beyond the control of the related party. However, in this case before me, the appellant's solicitors attributed the delay in filing the memorandum of appeal on the grounds that he was awaiting further instructions from the appellant and the relevant documents in view that the appellant was previously represented by a different solicitor in the proceedings before the Batu Pahat Sessions Court. In my view this excuse is indeed a lame excuse. Since he was appointed as the appellant's new solicitors after the notice of appeal was lodged, it was only reasonable to assume that all the necessary instructions must have already been given to extend to all matters incidental to the appeal such as preparing and filing the memorandum of appeal and other related matters thereafter, matters which

A are technical in essence which can be done without the presence of the appellant. Equally less convincing was his excuse that he was unable to contact the appellant and vice-versa.

B **[13]** The *Notis Perlantikan Peguamcara* dated 11 May 2006 was filed by the appellant's solicitors in this court on 16 May 2006. Beyond this date, up to the date of the filing of this application for extension of time which was filed on 29 March 2007, the solicitors for the appellant apparently did nothing. It does not impress me at all for the appellant's solicitors to now say that throughout this period he was waiting to get the instructions from the C appellant and was unable to get in touch with the appellants to get his instructions.

[14] The appellant's solicitors also submitted that there was a genuine D oversight on his part when he was caught unaware that the time to file the memorandum of appeal has expired. In my view this excuse is not maintainable in law. The delay was 8 months and 29 days. All in all, in my view what transpired merely goes to show the cavalier attitude of both the appellant and this solicitors, a behaviour which should not be tolerated and E condoned by the courts. It was said in the case of *Sarawak Electricity Supply Corporation & Ors v Kwan Choon Kiong* [2003] 4 CLJ 381:

> I am conscious of the fact that these provisions were incorporated with the intention 'to provide for smooth administration of the due process of litigation and F the administration of justice by way of substantial merits of the case and not on merely procedural technical objections'. (per Low Hop Bing J in *Beauford Baru Sdn Bhd v Gopala Krishnan VK Gopalan* [2002] 3 CLJ 686 at p 692 e-g).
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> … In contrast to the above two decisions, in *Othman Puteh & Anor v Ku Azman Ku Bahar* [2002] 7 CLJ 64 His Lordship Vincent Ng J found that there was gross G inordinate delay on the part of the appellants' solicitors (application for extension of time to file the appeal record was lodged nine months after the first hearing date); counsel showed indifferent conduct as until, the hearing date, there was no application for extension of time to file the memorandum of appeal and no explanation for the delay was tendered except for a plea of miscalculation of dates. H His Lordship dismissed the appeal on finding negligence on the part of the appellants' solicitors and the commission of breaches that were not only blatant and culpable but also varied and multiple …

[15] It was also urged upon me by learned counsel for the appellant to I invoke the provisions of O 1A and O 2 r 3 of the RHC and gloss over such technical objections. However in my view those rules are there for specific purposes, among others, to provide a certainty over procedural issues, minimise procedural quarrels, to reduce delays and to expedite the process of appeal for the benefit of the parties thereto. The rules of court are to be

obeyed for the alternative is judicial chaos. In *Ahmad bin Yahya & Anor v Ahmad bin Sulaiman* [1972] 2 MLJ 109, the court therein stipulates:

> Taking into consideration the relevant authorities applicable, I am of the view that the correct principle which applies to an application of this nature is as laid down by the Privy Council in *Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 229 PC. Although it was concerned with Order 58 r 22 of the Rules of the Supreme Court, it was dealing with an appeal from the order of the Court of Appeal dismissing an application for an order that the time for filing the record of appeal be extended. At p 229, thereof, Lord Guest says as follows:
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> The rules of court must prima facie be obeyed, and in order to justify a court in extending the time during which such step in procedure requires to be taken, there must be some material upon which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.

[16] It is pertinent to note that the amendment to O 55 r 2(1) is to prevent undue delay by any party dissatisfied with the court's decision to pursue his appeal and to provide a certain time table for the conduct of the litigation. To entertain the kind of excuses put forth by the appellant is to make a mockery of the amendment. In all the circumstances of the case, I am inclined to agree with learned counsel for the respondent's submission that the appellant sprung into action only after the respondent initiated the bankruptcy proceedings at the High Court with the intention of bankrupting the appellant upon the appellant's refusal to comply with the orders made by the Batu Pahat Sessions Court. The appellant strive to proceed with this application upon realising that the respondent is extremely serious to enforce the judgment he obtained against the appellant.

[17] For the reasons given, I find that the appellant had failed to provide any reasonable explanation to persuade the court to exercise its discretion to extend the 14 days period to enable the appellant to file his memorandum of appeal as required by law. Henceforth, I dismiss the appellant's application with cost.

Application dismissed with costs.

Reported by Sally Kee